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Supreme Court, U.S.
FILED
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

ROY BLAKENEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. IS THE INTEREST OF SOCIETY [ENCOMPASSED IN THE 4TH AMENDMENT TO THE U.S. CONSTITUTION] TO INSURE THAT SEARCHES OF HOMES ARE CONDUCTED PURSUANT TO WARRANTS, VIOLATED BY HOLDING THAT A PERSON'S RIGHT TO A HEARING [ENCOMPASSED IN THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT TO THE U.S. CONSTITUTION], TO ASCERTAIN WHETHER A LAW ENFORCEMENT OFFICER - WHO MADE A VERY FACTUALLY WRONG STATEMENT IN A WARRANT APPLICATION - THEREBY LIED, OR WAS RECKLESS, OR MADE AN INNOCENT MISTAKE, IS SATISFIED BY PERMITTING A COURT TO DENY AN EVIDENTIARY HEARING [ENCOMPASSED IN THE CONFRONTATION CLAUSE OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION], AND TO JUST SPECULATE AS TO WHETHER THE OFFICER LIED, OR RECKLESSLY DISREGARDED THE TRUTH, OR MADE AN INNOCENT MISTAKE?

2. IS THIS DECISION BY SPECULATION/ ASSUMPTION, IN VIOLATION OF THE DUE PROCESS REQUIREMENT THAT WHEN THERE IS A FACTUAL DISPUTE IN COLLATERAL PROCEEDINGS ATTACKING THE CONSTITUTIONAL BASIS OF A CONVICTION, EVIDENCE SHOULD BE HEARD - AND THUS, IN CONFLICT WITH SUCH DECISIONS OF THIS COURT AS Machibroda v. United States, 368 U.S. 487, 7 L.Ed.2d 473 (1962), AND Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202 (1986), AND IN CONFLICT WITH THE 7th CIRCUIT IN Castillo v. United States, 34 F.3d 443 (7 Cir. 1994)?

3. SHOULD THE RULE IN Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667 (1978), THAT THERE IS NO NEED FOR A HEARING, UNLESS THE WARRANT APPLICATION, ABSENT THE FALSE STATEMENT, IS INSUFFICIENT FOR A FINDING OF PROBABLE CAUSE, BE LIMITED, WHERE THE BLATANT MISSTATEMENT OF FACT IS CAUSED BY A LAW ENFORCEMENT OFFICER'S DELIBERATE LIE OR RECKLESS DISREGARD FOR THE TRUTH?

PARTIES INVOLVED

Petitioner, Roy Blakeney, was the defendant in the United States District Court for the Eastern District of Kentucky, London Division, and the appellant in the United States Court of Appeals for the Sixth Circuit.

Respondent, United States of America, was the plaintiff in the United States District Court for the Eastern District of Kentucky, London Division, and the appellee in the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Roy Blakeney (defendant) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the United States District Court for the Eastern District of Kentucky, London Division.

Opinions and Orders Below

The Opinion of the United States Court of Appeals for the 6th Circuit, No. 98-5021, dated September 21, 1999 (not published, per Circuit Rule 206), affirming the District Court's judgment filed December 8, 1997, denying the petition pursuant to 28 U.S.C. § 2255 and dismissing the matter with prejudice (App. D, pp. App. 40-41), is set out at App. A, pp. App. 1-16. On December 1, 1999, the 6th Circuit entered its Order [unpublished] denying petitioner's timely-filed petition for rehearing with suggestion for rehearing en banc. (App. B; pp. App. 17-18)

On December 8, 1997, the District Court filed its Order (App. D, pp. App. 40-41), accepting the Report and Recommendations of the Magistrate filed April 8, 1997. (App. C, pp. App. 19-39)

The Opinion of the 6th Circuit,

affirming petitioner's conviction and sentence on direct appeal, United States v. Blakeney, is reported at 942 F.2d 1001 (6 Cir. 1991).

Jurisdictional Statement

On September 21, 1999, the 6th Circuit filed its Opinion.[1] (App. A; pp. App. 1-16) Timely-filed petition for rehearing with suggestion for rehearing en banc, was denied December 1, 1999. (App. B; pp. App. 17-18) This Petition is timely filed within 90 days.

Jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

U.S. Const., Amends. IV, V and VI, set out at App. E, p. App. 42.

STATEMENT OF THE CASE

Jurisdiction in the court of first instance [with respect to the underlying judgment in Criminal Case No. 86-6-6-5-1] is based on 18 U.S.C. § 3231, which provides that the district courts of the United States shall have original

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[1] The appeal proceeded after the 6th Circuit (via Order filed September 23, 1998), granted petitioner's application for a certificate of appealability.

jurisdiction of all offenses against the laws of the United States. This cause arose initially as a prosecution of defendant, alleging offenses against the laws of the United States.

Jurisdiction in the court of first instance [with respect to the motion to vacate, filed as Civil Case No. 96-316] is based on 28 U.S.C. § 2255.

STATEMENT OF FACTS

Petitioner Roy Blakeney (hereafter, petitioner, defendant, or Blakeney) was convicted of drug trafficking and sentenced to 15 years on each count of the 3-count indictment,[2] with the sentences on counts 2 and 3 concurrent with one another and consecutive to the term on Count 1, for a total of 30 years. (R 473, Apx. pg. 66)[3] The judgment was affirmed on direct appeal. United States v. Blakeney, 942 F.2d 1001 (6 Cir. 1991) (hereafter, Blakeney).

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[2] Count 1 charged conspiracy re methamphetamine; count 2, possession with intent re phenylacetone, and count 3, possession with intent re methamphetamine.

[3] "R" refers to items in the 6th Circuit Record on Appeal in the habeas appeal, and "Apx." to pages of the Re-Corrected Joint Appendix in that cause.

Subsequently, he filed a Motion to Vacate under 28 U.S.C. § 2255, averring (a) that the affidavit for warrant that resulted in the search and evidence on which he was convicted, contained a false statement, that was shown to be false by the conflicting testimony of the same agent (Agent Alan Sadowski) on the same subject in a different federal criminal trial, and (b) that the false statement was intentionally false or made with reckless disregard for the truth, and that the said statement in the affidavit for warrant was material and essential to the finding of probable cause. (R 473, Apx. pgs. 69, 72-79)

The U.S. Magistrate Judge filed a Report and Recommendation [hereafter, R & R] that the sec. 2255 motion be denied (R 486, R & R, Apx. pgs. 106-116; App. C, pp. App. 19-39); petitioner filed objections. (R 487, Apx. pgs. 117-119)

The District Court adopted the R & R, denying the petition pursuant to 28 U.S.C. § 2255 and dismissing the matter with prejudice. (R 505, Apx. pg. 105; App. D, pp. App. 40-41)

Conflicting Sworn Allegations

Agent Sadowski's Affidavit[4]

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[4] Sadowski's warrant affidavit is attached to the sec. 2255 Motion. (R

In his affidavit for warrant to search defendant's residence, Agent Alan Sadowski averred an affirmative fact - that Curtis Anderson[5] was observed placing a garbage bag in a dumpster. Blakeney, 942 F.2d at 1024, 1025.[6]

Sadowski's Tampa Trial Testimony[7]

At trial in United States v. Johnson, et al., No. 93-180-CR-T-24(C) in the United States District Court for the Middle District of Florida, Tampa

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473, Apx. pgs. 95-104)

[5] Anderson was a co-defendant with defendant, both in the Kentucky case and in the Tampa case. Per the 6th Circuit direct appeal opinion, evidence as to the association between Anderson and defendant was material both to the finding of probable cause to arrest defendant, Blakeney, 942 F.2d at 1024, and to the finding of probable cause to search defendant's residence. Id. at 1025.

[6] The bag was found to contain items connected to Bakes jewelry store, a store that had been robbed. Ibid.

[7] Sadowski's Florida trial testimony is attached to the sec. 2255 Motion. (R 473, Apx. pgs. 80-94)

Division,[8] Agent Sadowski on January 10, 1995 testified before the Hon. Susan C. Bucklew, and a jury, that he did not observe Anderson place the bag in the dumpster, but instead, that Anderson was out of his sight for 6 or 7 minutes.[9] (R 473, Apx. pgs. 84-89) This trial testimony of Sadowski in the Florida case is diametrically opposed to the warrant affidavit averments that "Anderson had been observed dumping a large plastic garbage bag into a trash dumpster," Blakeney, 942 F.2d at 1024; otherwise put, that "Anderson also had been observed disposing of evidence from the jewelry robbery in the trash dumpster . . . in Boca Raton." Id. at 1025. (See R 473, G. App. p. 44, Apx. pg. 102.)

At the Tampa trial, Sadowski testified:

> "Q. *** It's your testimony that you did not personally see him [Curtis Anderson] place the garbage bag into the

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[8] Defendant was convicted in the Florida case.

[9] A copy of Agent Sadowski's cross-examination on Jan. 10, 1995, pages 1 through 15, is attached to Blakeney's sec. 2255 motion, R 473, Apx. pgs. 80-94.

dumpster?

A. That's correct, I did not see him do that." (R 473, App. A, p. 6, lines 21-23, Apx. pg. 85)

Sadowski testified, "From the time he [Anderson] walked behind the sporting goods store, reappeared and departed, I would -- I would guesstimate six, seven minutes had elapsed." (R 473, Apx. pg. 86)

Sadowski testified that the bag seen in Anderson's hands was "generic":

"Q. *** Was this what we would know as a generic black or green plastic garbage bag?

A. That's correct, yes.

Q. Can you describe it more specifically than I have?

A. No. It was a, uh, dark colored, uh, heavy plastic garbage bag like a Hefty bag type thing." (R 473, Apx. pg. 85)

Sadowski never testified he could identify the bag.

He also testified:

"Q. Okay.

And, in fact, there were other dumpsters and garbage cans if you have continued along behind the buildings; is that correct?

A. Yes, further -- further away." (R 473, Apx. pg. 86)

In the Tampa trial, it was called to Sadowski's attention, and he acknowledged, that in his affidavit in support of the search warrant (R 473, Apx. pg. 87), it says "that Anderson was observed taking a large plastic garbage bag from the trunk of the Cadillac and placing the bag in a garbage dumpster behind 5th Avenue shops," (R 473, Apx. pg. 87); Sadowski acknowledged, "that what it [his affidavit] says." (R 473, Apx. pg. 87) Then, the following question and answer:

"Q. * * * Today you're saying that you did not actually see him [Anderson] place the bag into the dumpster; is that correct?

A. That's correct." (R 473, Apx. pg. 87)

Sadowski acknowledged that when he stated in his affidavit that Anderson was observed placing the bag in the dumpster, this was an assumption on his

part. (R 473, Apx. pg. 88)

Sadowski testified further,

> "So the assumption on my part was that he [Anderson] placed it there, that's correct." (R 473, Apx. pg. 89)

And again:

> "Q. * * * But the truth is you never saw him [Anderson] actually place the bag in the dumpster?
>
> A. That's correct." (R 473, Apx. 89)

Findings Below

The Magistrate made two specific findings (App. C, pp. App. 36-38) - adopted by the District Court (App. D, pp. App. 40-41):

FIRST:

> "While petitioner has pointed out a specific discrepancy in the sworn testimony and asserted that the challenged statement in the affidavit was made with deliberate or reckless disregard for the truth, the undersigned does not find any deliberate falsity in the affidavit. It appears from the

> record that the inaccuracy was not a deliberate lie, but rather a logical inference under the facts." (Emphasis added.) (App. C, p. App. 36)

The Magistrate re-stated the same finding in the CONCLUSION of the R & R:

> "[T]his Court finds that the challenged statement by the FBI agent was an [*sic.*] logical assumption and did not rise to the level of 'deliberate or reckless falsity'." (App. C, p. App. 38)

SECOND:

> "The undersigned . . . finds that even if the challenged statement is omitted from the August 19, 1989 affidavit, sufficient facts to find probable cause are amply demonstrated.
>
> Petitioner points to the Sixth Circuit Court of Appeals statement that 'in the absence of the August 19, 1989 affidavit, the search warrant was not supported with probable cause.' See [United States v.] Blakeney, 942 F.2d [1001] at p. 1026 [6 Cir. 1991]. However, the lone inaccuracy in the August 19, 1989 affidavit does not invalidate the entire affidavit. . . [E]ven if

> the challenged statement is omitted, the remaining information fully supports a finding of probable cause to issue the search warrant." (R 486, R & R, p. 10, Apx. pg. 115; App. C, p. App. 37)

The Magistrate re-stated the same finding in the CONCLUSION of the R & R:

> "[E]ven after examining the affidavits in detail *without* the challenged statement, the undersigned finds that the remaining facts recited in the two affidavits provide sufficient facts to support a finding of probable cause to issue the search warrant for the petitioner's residence." (App. C, p. App. 38) (Emphasis in original.)

These findings - reached without an evidentiary hearing - were adopted by the District Court without an evidentiary hearing. (App. D, pp. App. 40-41)

REASONS FOR GRANTING CERTIORARI

1. THE INTEREST OF SOCIETY [ENCOMPASSED IN THE 4TH AMENDMENT TO THE U.S. CONSTITUTION] TO INSURE THAT SEARCHES OF HOMES ARE CONDUCTED PURSUANT TO WARRANTS, IS VIOLATED BY HOLDING THAT A PERSON'S RIGHT TO A HEARING [ENCOMPASSED IN THE DUE PROCESS CLAUSE

OF THE 5TH AMENDMENT TO THE U.S. CONSTITUTION], TO ASCERTAIN WHETHER A LAW ENFORCEMENT OFFICER - WHO MADE A VERY FACTUALLY WRONG STATEMENT IN A WARRANT APPLICATION - THEREBY LIED, OR WAS RECKLESS, OR MADE AN INNOCENT MISTAKE, IS SATISFIED BY PERMITTING A COURT TO DENY AN EVIDENTIARY HEARING [ENCOMPASSED IN THE CONFRONTATION CLAUSE OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION], AND TO JUST SPECULATE AS TO WHETHER THE OFFICER LIED, OR RECKLESSLY DISREGARDED THE TRUTH, OR MADE AN INNOCENT MISTAKE.

2. THIS DECISION BY SPECULATION/ ASSUMPTION, IS IN VIOLATION OF THE DUE PROCESS REQUIREMENT THAT WHEN THERE IS A FACTUAL DISPUTE IN COLLATERAL PROCEEDINGS ATTACKING THE CONSTITUTIONAL BASIS OF A CONVICTION, EVIDENCE SHOULD BE HEARD - AND THUS, IN CONFLICT WITH SUCH DECISIONS OF THIS COURT AS Machibroda v. United States, 368 U.S. 487, 7 L.Ed.2d 473 (1962), AND Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202 (1986), AND IN CONFLICT WITH THE 7th CIRCUIT IN Castillo v. United States, 34 F.3d 443 (7 Cir. 1994).

The process by which search warrants are obtained - ex parte hearing - is an exception to the norm; as a rule, judicial decisions concerning rights of

citizens must be made, in the open,[10] after a hearing,[11] where both the prosecution and the defense have the right to contest, by examination, the credibility and accuracy of what a witness asserts. This being so, when there is a major discrepancy between what a witness asserts in his affidavit for warrant, and what he should know is the truth - for resolution of the issue whether he lied, was reckless, or just made an innocent mistake, this Court "requires" a hearing: "[T]he **Fourth Amendment requires** that a hearing be held at the defendant's request." Franks v. Delaware, 438 U.S. 154, 156, 57 L.Ed.2d 667, 672 (1978). (Emphases added.)[12]

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[10] See In re Murchison, 349 U.S. 133, 99 L.Ed. 942 (1955); Waller v. Georgia, 467 U.S. 39, 81 L.Ed.2d 31 (1984) (right to public trial applies to hearing on motion to suppress evidence).

[11] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 94 L.Ed. 865, 873 (1950); Fuentes v. Shevin, 407 U.S. 67, 90 n.21, 32 L.Ed.2d 556, 575 n.21 (1972).

[12] More fully stated:

> "[W]e hold that, where the defendant makes a substantial preliminary showing that a false

Because, as this Court held in Franks, a defendant has a burden to prove by a preponderance of evidence, that in making the false statement in the warrant affidavit, the law enforcement officer lied intentionally, or acted with reckless disregard for the truth - as opposed to making an innocent mistake - the Fourth Amendment's hearing requirement as per Franks must be just

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> statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, **the Fourth Amendment requires that a hearing be held at the defendant's request**. In the event that at that hearing the allegation of perjury of reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 155-56, 57 L.Ed.2d at 672. (Emphases added.)

that - a hearing, which includes defendant's right to make inquiry of the officer by cross-examination, the "greatest legal engine ever invented for the discovery of truth." California v. Green, 399 U.S. 149, 158, 26 L.Ed.2d 489, 497 (1970), *quoting* 5 WIGMORE, EVIDENCE § 1367 (3d ed. 1940). Cross-examination has a significant effect on the "integrity of the fact-finding process." Berger v. California, 393 U.S. 314, 315, 21 L.Ed.2d 508, 510 (1969). "[N]o one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth . . . ." Pointer v. Texas, 380 U.S. 400, 404, 13 L.Ed.2d 923, 926 (1965).

Here, the Magistrate found, and the District Court concurred, that the FBI Agent's "inaccuracy" was a "logical inference" or "logical assumption" and not a deliberate or reckless falsehood, and denied a hearing. (App. C, pp. App. 36, 38; App. D, pp. App. 40-41)

This decision by speculation/ assumption, violates due process, which requires that when there is a factual dispute, evidence should be heard, Machibroda v. United States, 368 U.S. 487, 7 L.Ed.2d 473 (1962); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202 (1986); Castillo v. United States, 34 F.3d 443 (7 Cir. 1994), and that testimony should be taken where

factual disputes exist. Castillo v. United States, supra; accord, Buffalo v. Sunn, 854 F.2d 1158 (9 Cir. 1988).

The importance of live testimony in determining credibility, due to "matters that cannot be gleaned from a written transcript," is underscored in United States v. Mejia, 69 F.3d 309, 315 (9 Cir. 1995), utilizing principles recognized and applied by this Court in Anderson v. City of Bessemer, 470 U.S. 564, 575, 84 L.Ed.2d 518, 529 (1985) ("variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said").

Here, denying petitioner a hearing is crucial, where there is good reason to believe that at a hearing, confronting Agent Sadowski, a competent counsel could demonstrate the agent's motive to lie, and that he lied - or, at the very least, acted with reckless disregard for the truth. Courts realize that agents can be overzealous. As this Court has long recognized, officers, because they are overzealous, violate citizens' rights. United States v. Lefkowitz, 285 U.S. 452, 464, 76 L.Ed. 877, 882 (1931).[13] Such overzealousness leads

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[13] "Security against unlawful searches is more likely to be attained by resort to search

them to "puff" in warrant applications - i.e., to be reckless, or downright lie. See United States v. Cortina, 630 F.2d 1207 (7 Cir. 1980); see also Orfield, *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 131 (1992).

Here, the very facts (see pp. 3-9, supra) militate against the irrational decision of the Magistrate, upheld by the District Court and the 6th Circuit. Those facts are:

Agent Sadowski was an experienced agent with the FBI. It is an unbalanced "equation" to equate the real facts (see pp. 6-9, supra):

> seeing Anderson take a bag from his trunk and disappear behind a building, where he remained for a few minutes (at least three) in an alley where there were back doors to many businesses and many dumpsters, hence, a place where what was found could have been left by others and what Anderson left could have been placed into a

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warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime." Ibid.

> different dumpster (see Apx. 84-86),

to the false statement in the Affidavit (see p. 5, supra):

> "Anderson was observed taking a large plastic bag from the trunk of the Cadillac and placing that bag in a garbage dumpster . . . ." (App. A, p. App. 4; Apx. 87)

And when such statement is made by an experienced officer, it demonstrates an officer lying. He is lying to obtain what he knows he cannot obtain if he does not lie. It is folly to believe he was not acting in bad faith. See United States v. Alvarez, 127 F.3d 372, 375 (5 Cir. 1997).

Finally, because the exclusionary rule of the Fourth Amendment has as its purpose, to protect all citizens - to deny a hearing, where a prima facie misstatement has been made - is contrary to the purposes of the Fourth Amendment. It is contrary to this Court's decisions favoring warrants, Johnson v. United States, 333 U.S. 10, 13-14, 92 L.Ed. 436, 440 (1948); United States v. Lefkowitz, 285 U.S. 452, 464, 76 L.Ed. 877, 882 (1931); Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639 (1980); requiring a hearing, Franks v. Delaware, 438 U.S. 154, 156, 57 L.Ed.2d 667, 672 (1978); Machibroda v. United States, 368

U.S. 487, 7 L.Ed.2d 473 (1962); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 91 L.Ed.2d 202 (1986); and recognizing the need for cross-examination, California v. Green, 399 U.S. 149, 158, 26 L.Ed.2d 489, 497 (1970); Berger v. California, 393 U.S. 314, 315, 21 L.Ed.2d 508, 510 (1969); Pointer v. Texas, 380 U.S. 400, 404, 13 L.Ed.2d 923, 926 (1965), and for live testimony. Anderson v. City of Bessemer, 470 U.S. 564, 575, 84 L.Ed.2d 518, 529 (1985).

Moreover, as to the need to hear evidence where material facts are in issue in a sec. 2255 proceeding, this 6th Circuit decision in Blakeney's case, conflicts with the 7th Circuit's decision in Castillo v. United States, 34 F.3d 443 (7 Cir. 1994).

This Court has an obligation to citizens and to the judicial process, to uphold the purpose of the 4th Amendment, and not merely "wink" at police corruption; for it is just as corrupt for police to lie to convict the ever-so-guilty, as to lie as part of a payoff to help to acquit the guilty. And when a trial court, or reviewing court, accepts or condones such a lie - calling it a "mistake," or a "logical inference"[14] - the court acts contrary

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[14] It is not that inferences cannot be drawn in the warrant procurement

to the interests of citizens and contrary to dictates of the U.S. Constitution, and tends to provide an incentive to the police to lie, and/or violate citizens' rights. Mapp v. Ohio, 367 U.S. 643, 659, 6 L.Ed.2d 1081, 1092 (1961), citing Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 485, 72 L.Ed. 944, 959 (1928).

Unless this Court grants certiorari in this case and takes appropriate action, this Court is a tacit confederate in the insidious use by the government of a false statement by an officer who violated his sworn duty to uphold the law. Failure to act when confronted with such a situation, renders the Court an accomplice of the wrongdoing, and encourages the continuing use of blatant lies in warrant applications. See Mapp, supra; dissent of Justice Brandeis in Olmstead, supra.

For the foregoing reasons, this

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process; it is that inferences should be drawn only by an impartial judicial officer, not by an overzealous law enforcement officer. Johnson v. United States, 333 U.S. 10, 13-14, 92 L.Ed. 436, 440 (1948); United States v. Lefkowitz, 285 U.S. 452, 464, 76 L.Ed. 877, 882 (1931).

Court should review this case.

3. THE RULE IN Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667 (1978), THAT THERE IS NO NEED FOR A HEARING, UNLESS THE WARRANT APPLICATION, ABSENT THE FALSE STATEMENT, IS INSUFFICIENT FOR A FINDING OF PROBABLE CAUSE, SHOULD BE LIMITED, WHERE THE BLATANT MISSTATEMENT OF FACT IS CAUSED BY A LAW ENFORCEMENT OFFICER'S DELIBERATE LIE OR RECKLESS DISREGARD FOR THE TRUTH.

The rule of Franks, supra - that no hearing is required on whether the factual misstatement was a purposeful falsehood or made with reckless disregard for the truth, or was merely an innocent mistake, if the other factual averments in the warrant application are sufficient to demonstrate probable cause - is contrary to and undermines the effectiveness of this Court's holdings that to protect persons in their homes, residence searches must "normally" be by way of warrants obtained before neutral magistrates, Johnson v. United States, 333 U.S. 10, 13-14, 92 L.Ed. 436, 440 (1948); Payton v. New York, 445 U.S. 573, 63 L.Ed.2d 639 (1980), in order to deter improper police action motivated by overzealousness in catching their prey. United States v. Lefkowitz, 285 U.S. 452, 464, 76 L.Ed. 877, 882 (1931) (see quotation, fn. 13, pp. 16-17, supra).

The Franks rule - by thus restricting the requirement of a hearing, to situations where the averments absent the incorrect information are insufficient for probable cause - is contrary to the foregoing mandatory constitutional principles invoked in Points 1 and 2 above; because where, after a hearing, it can be proven that the officer lied on a given issue, there is no longer any reason to give credence to any of the other factual allegations this officer made in the warrant application. Merely because the other facts in the warrant application - as is often the case - can not be demonstrated to be lies by "hard" evidence, the very nature of the allegations may, as here, be sufficiently subjective (i.e., related to the officer's mental state), that even though specific "hard" proof of falsehood may not be forthcoming, all the other allegations may also be lies.

That is the situation here.

The 6th Circuit sets out what the two affidavits state as follows:

> "[R]ead together, the affidavits [in support of the warrant to search Petitioner's apartment] set forth the following information:
>
> (1) A burgundy Cadillac had been linked to the jewelry

store robbery, and Petitioner had a burgundy Cadillac registered under an alias;

(2) Items fitting the description of items stolen from the jewelry store were found in Petitioner's Cadillac;

(3) Petitioner, Anderson, and Johnson were all using aliases;

(4) A silver Cadillac, driven by Johnson, was also registered to Petitioner's alias;

(5) The plastic garbage bag Anderson was observed carrying behind the Fifth Avenue Shops was found to contain jewelry store price tags, several pieces of jewelry, and other evidence from the robbery of the Green Bay jewelry store; and

(6) When Petitioner, Anderson, and Johnson were arrested on outstanding arrest warrants, Johnson's wife was in possession of $15,680 in cash and a ring which matched the description of a ring taken in the Green Bay robbery." (App.

A, pp. App. 14-15)

Paragraph 1 is vague and may be the result of a reckless or lying officer, cleverly constructing something out of nothing. The assertion that a burgundy Cadillac had been linked to the store robbery, is not true. "Linked" means involved. Here, there was nothing more than mere speculation. The affidavit for the search warrant reads:

> "7. Witnesses to the armed robbery of BAKE'S JEWELRY, Green Bay, Wisconsin, which occurred on August 11, 1989, have advised that during the early morning hours of that date, an unknown white male and white female were observed in a burgundy Cadillac in the vicinity of BAKE'S JEWELRY STORE." (Attachment to R.473; Apx. 98; par. 7, Affidavit dated Aug. 21, 1989)

This proves no "link". Under Illinois v. Gates, 462 U.S. 213, 76 L.Ed.2d 527 (1983), there remains under the balancing test, a requirement of reliability. Here, there is no basis for a court to find that the statement in par. 7 is reliable evidence of defendant's involvement in a crime.

Even with citizen witnesses, who are

deemed credible, i.e., are not lying, there is the issue of reliability, or linkage. A magistrate does not know if, by "early morning hours," the affiant meant to refer to a time before or after the crime; a magistrate does not know if "vicinity" means, a block, or a mile; a magistrate does not know if by "witness to armed robbery" the affiant means persons who actually saw the robbery, or just saw this car some unknown distance from, and unknown time-span before or after, the robbery. Furthermore, the information - burgundy Cadillac - is just too general, fitting too many cars. Similarly, the description of unknown white male - with no description as to age, size or height, is just too general, to have any discernible meaning. Here the description of the car, would fit too many cars, and hence, did not provide probable cause.

> "[A] description which would fit many people [or cars] will not suffice [to provide probable cause]." 2 LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 3.4(c) at 243 (3d ed. 1996).

See United States v. Shavers, 524 F.2d 1094 (8 Cir. 1975); United States v. Greene, 783 F.2d 1364, 1367 (9 Cir. 1986); State v. Federici, 179 Conn. 46, 425 A.2d 916 (1979).

Paragraph 2 also appears to be a misstatement of facts known by the agent. First, it was not items, plural. What the affidavit alleged, was that one (1) watch was found. Moreover, the agent had an inventory of every Bake's Jewelry watch stolen, and he knew, or if he had consulted the inventory, should have known, that what was found in petitioner's car was not one of the stolen Bake's Jewelry watches. This can be proved at evidentiary hearing.

There is reason to believe he had checked the inventory. As to a ring found with Johnson's wife, he averred:

> "Your affiant has reviewed a listing of items stolen from the aforementioned armed robbery of BAKES'S JEWELRY STORE and has found a ring identical to the above amethyst piece identified as stock number R 3639." (Attachment to R.473; Apx. 103; from par. 11 of Affidavit dated Aug. 19, 1989)

Because he checked the listing of items stolen (i.e., inventory) to make sure that the ring found was a stolen ring, we can properly assume he checked - and knew - that the watch found in petitioner's car was not a watch stolen in the robbery. If it was a stolen watch, he, having gone over the

inventory, would have stated it was a watch listed on the inventory, as he did with the stolen ring.

Paragraphs 3 and 4 merely show that petitioner and his friends may have been using assumed names. It did not prove that petitioner had any part in the Wisconsin robbery.

Paragraph 5 was the crucial paragraph that contained the agent's lie.

Paragraph 6 connected Johnson and his wife. There is no connection to petitioner Blakeney.

Hence, remove the lie, and knowing the truth about Paragraphs 2 and 3 demonstrates there was no probable cause to search petitioner's home. Therefore, even under Franks as it now exists, the 6th Circuit was wrong when it found there was probable cause. (App. A, pp. App. 15-16)

The robbery occurred on 8/11/89; the observation of Anderson on 8/18/89; the arrest of defendant, on 8/19/89. Paragraph 7 of the affidavit dated Aug. 19, 1989 (Apx. 101-02) - summarized as par. 5 in the 6th Circuit's summary at App. A, p. App. 14 (see p. 23, supra) ("the plastic garbage bag Anderson was observed carrying . . . was found to contain . . . [fruits and evidence of the Bakes robbery]") - thus becomes THE

crucial fact constituting probable cause, considering what is set out in par. 8 of the Affidavit:

> "8. Your affiant retrieved that garbage bag and after opening it, observed numerous jewelry store price tags utilized to price jewelry in retail stores, jewelry display racks normally utilized to display jewelry in retail stores, identification tags for several jewelry stores located in northern states; one tag identifying BAKE'S JEWELRY in Green Bay, Wisconsin, several pieces of duck tape, diamond certification appraisals, and several pieces of women's jewelry." (Apx. 102)

It is paragraphs 7 and 8 together, that (arguably) provide probable cause. Without par. 7 (Apx. 101-02) (summary par. 5; App. A, p. App. 14, there is nothing but surmise and suspicion.

Without the evidence that Anderson possessed tags used in Wisconsin jewelry stores, and a Bakes tag, all the other evidence demonstrated only that: (a) Johnson's wife had money; (b) Johnson's wife possessed a stolen item, one stolen ring, days after the event, and petitioner may have possessed a stolen watch.

There was no probable cause to

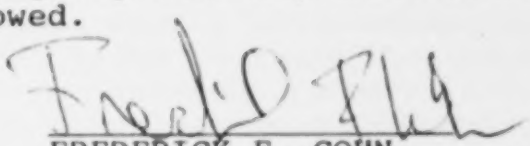
believe petitioner was involved in the Wisconsin robbery, or that he possessed in his house, items from that robbery. One can buy a piece of stolen (burgled) jewelry in the "market place," without being involved in the burglary. Cf. Ward v. Lockhart, 841 F.2d 844 (8 Cir. 1988) (recent possession of burgled items insufficient to prove burglary); Clark v. Procunier, 755 F.2d 394 (5 Cir. 1985) (same). Hence, the untrue portion of the Affidavit was crucial.

Because par. 7 of the agent's Affidavit is a lie, and the remaining averments may also contain misstatements, a hearing should have been held.

We ask this Court to hold that judicial integrity and integrity of law enforcement are more important than catching who we may think is the "bad guy." Law, and respect for the law, demand rejection of the 6th Circuit decision.

CONCLUSION

For the foregoing reasons, certiorari should be allowed.



FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 206 limits citation to specific situations. Please see Rule 206 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

No. 98-5021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY C. BLAKENEY,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

OPINION

F I L E D
SEP 21 1999
LEONARD GREEN, Clerk

BEFORE: KEITH, BOGGS, and CLAY, Circuit Judges.

PER CURIAM. Petitioner, Roy C. Blakeney, appeals from the order entered by the United States District Court for the Eastern District of Kentucky on December 8, 1997, denying Petitioner's motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. Petitioner was convicted of conspiracy to unlawfully manufacture methamphetamine, possession with intent to manufacture, distribute and dispense approximately 150 gallons of phenylacetone, and possession with intent to distribute approximately 14 pounds of methamphetamine.

Petitioner appealed his conviction to this Court, which affirmed the judgment of the district court. See United States v. Blakeney, 9[4]2 F.2d 1001 (6th Cir. 1991). After his conviction was upheld, Petitioner filed a 28 U.S.C. § 2255 motion to vacate or set aside his sentence, claiming that new evidence had been discovered. According to Petitioner, the affidavit for the search warrant that resulted in the search of his apartment contained an intentionally false statement and therefore all *[p. 2]* evidence from this search must be suppressed. The district court denied his motion and Petitioner now appeals that decision.

I.

On March 12, 1986, a federal grand jury returned an indictment charging Petitioner and Herbert Spencer with conspiracy to manufacture, possess and distribute methamphetamine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 18 U.S.C. § 2. Spencer was tried in the Eastern District of Kentucky, convicted on all counts, and sentenced to 27 years imprisonment, while Petitioner absconded and remained a fugitive at the time of Spencer's trial. *See United States v. Spencer,* 1988 WL 10698 (6th Cir. Feb. 11, 1988).

In August 1989, federal law enforcement agents were investigating the whereabouts of Curtis Anderson, John Johnson, and Petitioner in connection with an armed robbery of Bake's Jewelry Store in Green Bay, Wisconsin. All three were identified and placed under surveillance in Boca Raton, Florida.

In the course of the surveillance, on August 18, 1989, FBI Special Agent Alan Sadowski observed Curtis Anderson leave an apartment and drive away in a Cadillac. Agent Sadowski followed Anderson to a shopping district, where he saw him get out of the car, open the trunk, and retrieve a large plastic garbage bag from the trunk. Anderson then went behind a building called Fifth Avenue Shops and reappeared a few minutes later without the bag. Agent Sadowski immediately went behind the

Fifth Avenue Shops and saw several garbage dumpsters. He looked into the nearest dumpster, saw a large plastic bag that appeared to be identical to the one he had seen Anderson carrying, and retrieved it. The plastic bag was the only one in the dumpster and was found to contain jewelry tags (including one with the name of Bake's Jewelry Store) and jewelry that matched the *[p. 3]* inventory of the stolen items. Anderson, Johnson, and Petitioner were all arrested on outstanding fugitive warrants the next day, August 19, 1989. Evidence recovered at the time of the arrest from Petitioner's car and from John Johnson and his wife included items matching descriptions of the stolen jewelry.

Immediately after the arrests, Agent Sadowski appeared before a United States magistrate judge and swore to an affidavit in support of a warrant to search Johnson's hotel room. The affidavit contained the following statement:

> ANDERSON was observed taking a large plastic bag from the trunk of the Cadillac and placing that bag in a garbage dumpster behind FIFTH AVENUE SHOPS.

On the basis of that affidavit, agents searched Johnson's hotel room. That search yielded more stolen jewelry as well as documents linking Johnson and

Anderson to Petitioner at his Boca Raton address. The agents then returned to the magistrate with a second affidavit recounting the new evidence seized during the search of the hotel room, incorporating the first affidavit, and seeking permission to search Petitioner's residence for further evidence of the jewelry store robbery. In addition to incorporating all of the statements contained in his first affidavit, Sadowski's second affidavit stated that:

> Based upon the affiant's experience, the items found in the hotel room registered to Anderson, and the Gucci watch found in the trunk of Blakeney's vehicle, your affiant has good reason to believe that [evidence of the robbery] will be at [Blakeney's residence].

Based on the information contained in the two affidavits, the magistrate judge found that there was probable cause to search Petitioner's residence and issued a warrant authorizing the search. The search of Petitioner's apartment yielded, among other things, a recipe for methamphetamine manufacture, chemical equipment for methamphetamine production, and a lease for property in *[p. 4]* Pleasureville, Kentucky, where agents had earlier found the remains of a methamphetamine laboratory. *See Blakeney*, 942 F.2d at 1008.

Petitioner was returned to Kentucky, and on September 6, 1989, he and two co-defendants were indicted in the Eastern District of Kentucky and charged with (i) conspiracy to manufacture, distribute and dispense methamphetamine, in violation of 21 U.S.C. § 846; (ii) conspiracy to manufacture, distribute and dispense approximately 150 gallons of phenylacetone, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and (iii) possession with intent to distribute approximately 14 pounds of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

The case was tried before a jury and Petitioner was found guilty on all counts of the indictment. On May 8, 1990, the district court sentenced him to 30 years imprisonment. This Court affirmed Petitioner's conviction on direct appeal in an opinion issued August 23, 1991. *See Blakeney,* 942 F.2d 1001.

After his federal trial in Kentucky, Petitioner and several co-defendants, including Johnson and Anderson, were tried in Florida on a criminal RICO charge. *See United States v. Johnson, et al.*, Case No. 93-180-CR-T-24(C) (M.D. Fla. 1995). During this trial, Agent Sadowski testified that, contrary to the statement contained in his August 19, 1989 affidavit, he had not actually *seen* Anderson place the

garbage bag in the dumpster behind the Fifth Avenue Shops building. Rather, Agent Sadowski testified, he had observed Anderson carry the bag behind the building, where he remained out of view for a few minutes, and then return empty-handed. Agent Sadowski further testified that he immediately went behind the building and retrieved the only bag in the dumpster, and that the bag appeared to be identical to the one Anderson had been carrying moments earlier. Based *[p. 5]* on Sadowski's revised statement, Petitioner moved the court for a *Franks* hearing,[1] claiming that the affidavit upon which the magistrate had relied in issuing the search warrant contained a known false statement and therefore the fruits of the search of his Boca Raton home should be suppressed. The Florida district court denied Petitioner's motion, holding in effect that the evidentiary record was sufficiently developed at

---

[1] In *Franks v. Delaware,* 438 U.S. 154 (1978), the Supreme Court held that where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by an affiant in search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at defendant's request.

trial, and that no deliberate falsehood tainted the warrant. Petitioner was subsequently convicted on the RICO charge in Florida, and he appealed to the Eleventh Circuit Court of Appeals, which upheld his conviction on August 21, 1997, in an unpublished table decision. *See United States v. Johnson*, 124 F.3d 220 (11th Cir. 1997) (Table).

While his appeal to the Eleventh Circuit was pending, Petitioner moved the district court in the Eastern District of Kentucky to vacate his sentence pursuant to 28 U.S.C. § 2255, claiming that newly discovered evidence had surfaced in his Florida trial. Petitioner further claimed that Agent Sadowski's testimony during the Florida trial established that his August 19, 1989 affidavit, which ultimately led to evidence used for his methamphetamine convictions, was intentionally false. Petitioner argued that Agent Sadowski's false statement in the affidavit was essential to the magistrate judge's finding of probable cause for the search and that, as a result, the search was executed in violation of the Fourth Amendment, requiring the fruits of the search to be suppressed.

On April 8, 1997, United States Magistrate Judge J.B. Johnson, Jr. recommended that Petitioner's motion be denied. The magistrate found that Agent Sadowski's affidavit did not contain a deliberate falsity; rather, the

magistrate deemed the inaccuracy to be a logical inference under the *[p. 6]* facts. The magistrate further found that even if the challenged statement were omitted from the affidavit, sufficient facts still existed to support probable cause sufficient for the issuance of the search warrant. The magistrate thus determined that Petitioner was not entitled to a *Franks* hearing or any other relief under § 2255.

Petitioner filed objections to the magistrate's report, but the district judge, after a *de novo* review of the record, concurred with the result recommended by the magistrate and issued an order on December 8, 1997 adopting the magistrate's report and recommendation and denying Petitioner's § 2255 motion.

II.

In reviewing the denial of a 28 U.S.C. § 2255 petition, this Court applies a *de novo* standard of review of the legal issues and will uphold the factual findings of the district court unless they are "clearly erroneous." *Hilliard v. United States,* 157 F.3d 444, 447 (6th Cir. 1998). Where no evidentiary hearing is held, the district court's denial of the motion will be upheld where "the files and records of the case conclusively establish that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *see*

also Baker v. United States, 781 F.2d 85, 92 (6th Cir. 1986).

III.

The government urges this Court to reject Petitioner's argument on grounds of issue preclusion since his Florida conviction is now final. The government argues that Petitioner is merely attempting to relitigate an issue already decided by the Middle District Court of Florida and affirmed by the Eleventh Circuit. We decline to do so for several reasons. First, the Eleventh Circuit affirmed Petitioner's entire conviction without issuing an opinion, giving no indication of the rationale behind its decision. Second, the issue before us is closely connected to the question of probable cause which *[p. 7]* has already been considered by this Court on direct appeal. Consequently, we feel justice would best be served by full consideration of Petitioner's claim on its merits.

IV.

Petitioner argues that the Kentucky district court improperly denied his § 2255 motion without the benefit of a *Franks* hearing on his claim that the false statement in Agent Sadowski's affidavit required suppression of evidence used in Petitioner's drug conviction. We disagree. Under *Franks*, "a defendant is

entitled to an evidentiary hearing on the veracity of the statements of the affiant in a warrant affidavit if and only if (1) there is a substantial preliminary showing that specified portions of the affiant's averments are deliberately or recklessly false and (2) a finding of probable cause would not be supported by the remaining content of the affidavit when the allegedly false material is set to one side." *United States v. Campbell,* 878 F.2d 170, 171 (6th Cir. 1989).

We first consider whether Agent Sadowski's statement to the effect that he had observed Anderson place the garbage bag in the dumpster behind the Fifth Avenue Shops building constitutes a substantial preliminary showing of deliberate or reckless falsehood. The Kentucky and Florida trial courts, in examining this question, concluded that Agent Sadowski's statement was neither deliberately false nor made with a reckless disregard for the truth but rather was merely a "logical inference under the facts." Agent Sadowski, on cross-examination in the Florida trial, admitted that he had seen Anderson carry a bag behind a building, only to emerge empty-handed a few minutes later. Agent Sadowski testified that when he went behind the building and looked in the nearest dumpster, there was only one plastic bag in the dumpster and that bag appeared to be identical to the one he had seen Anderson carrying. Agent

Sadowski further testified that although there were other dumpsters behind the Fifth Avenue Shops building, he did not believe that Anderson would have had *[p. 8]* time to walk all the way down to the other dumpsters and back during the few minutes he was out of view, and so he looked in the dumpster closest to where had last seen Anderson. It is apparent that Sadowski logically and in good faith concluded that Anderson had placed the bag in the dumpster, even though he did not actually see him do so. And while hindsight tells us that Agent Sadowski's inference was undoubtedly the correct one, the question before us is whether his statement that he had actually *observed* Anderson place the bag in the dumpster is enough for a substantial preliminary showing of deliberate or reckless falsehood. Our review of Agent Sadowski's testimony and the relevant case law lead us to conclude that it was not. Agent Sadowski was cross-examined extensively about his misstatement by defense counsel in the Florida trial. He admitted that he had made an assumption based on facts he knew to be true. There is no indication that Agent Sadowski's statement was anything other than a permissible and logical inference, and Petitioner has presented no evidence which would establish that Agent Sadowski made a false statement knowingly or recklessly, as required by *Franks*. In *United States v. Ayen*, 997 F.2d 1150, 1153 (6th Cir. 1993), this

Court held that although an intentional or recklessly made false statement must be stricken from the affidavit, a defendant cannot succeed in his challenge to the search warrant by demonstrating non-material negligence, carelessness, or innocent mistakes. Given the circumstances, we are convinced that Agent Sadowski's statement, while not technically accurate, does not rise to the level of a deliberate or reckless falsehood.

Regardless of the outcome on the first prong of the *Franks* analysis, however, the second prong must certainly prove fatal to Petitioner's challenge. It is plain that even if Agent Sadowski's misstatement were in fact proven to be deliberate or reckless, the district court properly denied a *Franks* hearing because the statement in question was not essential to a finding of probable cause. *[p. 9]* "[I]f, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the affidavit to support a finding of probable cause, no hearing is required." *Franks,* 438 U.S. at 171-72. Thus, our inquiry ceases where, as here, there remains sufficient evidence to support a finding of probable cause even if the challenged statement is excluded. *See Mays v. City of Dayton,* 134 F.3d 809, 815 (6th Cir. 1998).

There were two affidavits

submitted in support of the warrant to search Petitioner's apartment. The second affidavit incorporated the first, and read together, the affidavits set forth the following information:

> (1) A burgundy Cadillac had been linked to the jewelry store robbery, and Petitioner had a burgundy Cadillac registered under an alias;
>
> (2) Items fitting the description of items stolen from the jewelry store were found in Petitioner's Cadillac;
>
> (3) Petitioner, Anderson, and Johnson were all using aliases;
>
> (4) A silver Cadillac, driven by Johnson, was also registered to Petitioner's alias;
>
> (5) The plastic garbage bag Anderson was observed carrying behind the Fifth Avenue Shops was found to contain jewelry store price tags, several pieces of jewelry, and other evidence from the robbery of the Green Bay jewelry store; and
>
> (6) When Petitioner, Anderson, and Johnson were arrested on outstanding arrest warrants, Johnson's wife was in possession of$ 15,680 in cash and a ring

> which matched the description of a ring taken in the Green Bay robbery.

In light of the above listed factors, it is plain to us that even if Agent Sadowski's challenged statement were omitted, there would still be sufficient evidence to establish probable cause to search Petitioner's apartment for evidence connected to the jewelry store robbery. This Court has defined probable cause as "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." *United States v. Smith,* 182 F.3d 473, 477 (6th Cir. 1999) (citation and internal *[p. 10]* quotation omitted). We are convinced that, under the totality of the circumstances, the unchallenged information in the affidavits was more than sufficient to provide reasonable grounds for belief that Petitioner may have been in possession of additional stolen items. *See Illinois v. Gates,* 462 U.S. 213, 238 (1983) (directing courts to adopt a practical, common-sense approach in determining whether, under the totality of the circumstances, there is a fair probability that contraband or evidence of a crime will be found in a particular place). We therefore find Petitioner's claim that Agent Sadowski's challenged statement was essential to a finding of probable cause to be without merit. The district court properly denied Petitioner's § 2255 motion

without the benefit of a *Franks* hearing. Petitioner has failed to show that Agent Sadowski's misstatement was deliberately or recklessly false. Moreover, even if Agent Sadowski's statement that he had observed Anderson placing the garbage bag in the dumpster were proven to be deliberately or recklessly false, the district court properly held that this statement was not material to the probable cause determination.

For the reasons set forth above, the Order of Judge Jennifer B. Coffman of the United States District Court for the Eastern District of Kentucky is hereby **AFFIRMED.**

APPENDIX B

No. 98-5021

FILED
Dec 01 1999
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROY C. BLAKENEY,)
)
Petitioner-Appellant,)
)
)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

BEFORE: KEITH, BOGGS and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also

to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

signed: _____

Leonard Green, Clerk

Judge Siler recused himself from participation in this ruling.

APPENDIX C

Eastern District of Kentucky
F I L E D
APR 8 1997
AT LONDON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION
CRIMINAL CASE NO. 86-6-5-1

MOTION TO VACATE FILED AS:
CIVIL CASE NO. 96-316

UNITED STATES OF AMERICA

PLAINTIFF

VS. **REPORT AND RECOMMENDATION**

ROY C. BLAKENEY
DEFENDANT

****

This matter is before the Court upon the "Motion to Vacate, Set Aside, or Correct Sentence" (DE#473) pursuant to 28 U.S.C. §2255 by the petitioner, Roy C. Blakeney. Petitioner is represented by counsel. This matter was referred to the undersigned Magistrate Judge for initial consideration and a report and recommendation pursuant to 28 U.S.C. §636(b). The undersigned

Magistrate Judge having considered the Motion and Memorandum in Support (DE#473, 474), Response (DE#479), and Reply (DE#485), and being fully advised, recommends as follows:

FACTS AND PROCEDURAL HISTORY

On March 12, 1986, a federal indictment was returned against petitioner and Herbert B. Spencer, charging them with violation of 18 U.S.C. §846, 18 U.S.C. §841(a)(1), and 18 U.S.C. §2, including conspiracy to unlawfully manufacture methamphetamine in connection with a methamphetamine laboratory in Kentucky. Petitioner was a fugitive while the trial of co-defendant Spencer proceeded in the United States District Court for the Eastern District of Kentucky. The jury found Spencer guilty on all counts.

On August 18, 1989, FBI Agent Alan Sadowski was surveilling Curtis Anderson in Florida as part of an investigation regarding the suspected *[p. 2]* involvement of Roy C. Blakeney, Curtis Anderson, and John Robert Johnson in the burglary of Bake's Jewelry Store in Green Bay, Wisconsin. All three individuals were using "alias" names and were fugitives under indictment for other crimes. Respondent states that FBI agents had also conducted a search of a Florida warehouse used by petitioner, and discovered semiautomatic weapons wrapped in ski masks, lock picks, bank bags and police call radio frequency

books.

Subsequent to the surveillance of Anderson, two affidavits were provided to the Magistrate Judge in Florida for the purpose of obtaining a search warrant to search the petitioner's Florida residence. The earlier affidavit on August 19, 1989 was the basis for a search of room #1023 of the Marriot Hotel located in Boca Raton, Florida. Petitioner was also arrested on August 19, 1989. The later affidavit was attached to the earlier affidavit and listed additional information such as evidence found in the hotel room search and in the trunk of petitioner's car upon his arrest. The Magistrate Judge found sufficient probable cause and issued the search warrant.

During the search of the petitioner's residence, police found chemical equipment for methamphetamine production, a lease for Kentucky real estate where agents had previously found the remains of a methamphetamine laboratory, as well as a book, recipe, and other written information concerned with methamphetamine production. Items discovered in the search of petitioner's Florida residence were used as evidence in the subsequent federal trial in Kentucky.

On September 6, 1989, a superceding [*sic.*] indictment was returned in the Eastern District of Kentucky charging petitioner and two co-defendants each with one count of conspiracy to manufacture, distribute,

and dispense methamphetamine, in violation of 21 U.S.C. §846, one count of possession with intent to manufacture, distribute, and dispense approximately 150 gallons of phenylacetone, in violation of 21 U.S.C. §841(a)(1), and one count of possession with intent to distribute approximately fourteen pounds of methamphetamine, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. Petitioner pleaded not guilty and received a jury trial. Petitioner did not testify at his trial.

Petitioner was convicted on all three counts in the United States District Court for the Eastern District of Kentucky for violation of 21 U.S.C. §846, 21 U.S.C. §841, and 18 U.S.C. §2. The trial court sentenced petitioner on May 8, 1990 to fifteen years imprisonment on each count, with Counts Two and Three concurrent with each other and consecutive to Count One, for a total of thirty years *[p. 3]* imprisonment. Petitioner's co-defendants were also convicted.

On direct appeal, the Sixth Circuit Court of Appeals affirmed the convictions and sentences on August 23, 1991. Petitioner's petition for writ of certiorari to the United States Supreme Court was denied on January 13, 1992. See United States v. Blakeney, 942 F.2d 1001 (6th Cir. 1991), cert. denied, 502 U.S. 1035 (1992).

Subsequent to his federal trial in Kentucky, petitioner and numerous co-defendants were convicted and sentenced

on May 10, 1995 in the United States District Court for the Middle District of Florida for offenses such as RICO violation, conspiracy to commit RICO violation, and conspiracy under the Hobbs Act. See United States v. Johnson et al., Case No. 93-180-CR-T-24(C). The petitioner's federal conviction in the previous Kentucky case provided a predicate act for the petitioner's federal conviction in the Florida case.

During the Florida trial, FBI Agent Sadowski testified on January 10, 1995 regarding his surveillance of Curtis Anderson in Florida and his affidavit thereto. Id., TR. p. 10. See also DE#473, Petition with attached "Excerpt of Transcript of Testimony". The record indicates that on August 18, 1989, Agent Sadowski was surveilling Curtis Anderson in Florida and observed him exit Apt.# 107, 5151 West Club Circle, Boca Raton, and enter a Cadillac. Agent Sadowski then followed Anderson to a strip mall, "Fifth Avenue Shops", where he observed Anderson get out of the Cadillac, open its trunk, and remove a large plastic bag.

The following fact provides the basis for petitioner's argument in his present motion under §2255: Agent Sadowski then testified that he had observed Anderson carry the bag and walk behind the shops, out of Agent Sadowski's view, for several minutes and then return without the bag. Agent Sadowski further testified that he immediately went to the back of the

store where a dumpster was located and retrieved the only bag in the dumpster. The agent testified that it appeared to be identical to the bag carried by Anderson moments earlier and that the dumpster was the only dumpster in the immediate vicinity that Anderson could have reached in that time interval. See TR. p. 10. The bag contained evidence of the jewelry store robbery.

In his earlier affidavit on August 19, 1989, Agent Sadowski had stated that "Anderson was observed taking a large plastic bag from the trunk of the Cadillac and placing that bag in a garbage dumpster behind the FIFTH AVENUE SHOPS." This is the only alleged discrepancy between the affidavit and the testimony in Florida on January 10, 1995.

Subsequent to the agent's testimony in Florida, petitioner, through his *[p. 4]* counsel, requested a hearing under Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) in order to suppress the fruits of the search of the petitioner's Florida residence. On November 17, 1995, the United States District Court in Florida denied the motion. See United States v. Johnson et al., supra, TR. Vol.VIII, p.114-116.

Petitioner's appeal of his federal conviction in Florida was pending before the 11th Circuit Court of Appeals, Case No. 95-2626, at the time the present petition was filed. Petitioner also recently indicated in his reply brief,

filed March 19, 1997, that this appeal was still pending. Research to date does not reveal a decision by the Eleventh Circuit Court of Appeals. The petitioner's motion to hold the appellate decision "in abeyance", pending disposition of the present §2255 motion, was denied in Florida.

Petitioner is currently in federal custody at F.C.I. in Miami, Florida.

CONCLUSIONS OF LAW

A. Applicability of Amended §2255

The present §2255 motion to vacate, set aside, or correct was filed on August 9, 1996 subsequent to the passage on April 24, 1996 of the "Antiterrorism and Effective Death Penalty Act of 1996" (hereinafter "AEDPA") which contained significant amendments to 28 U.S.C. §2255. This Court notes that because the amended statute was only recently enacted, there are no Sixth Circuit Court of Appeals opinions regarding the applicability and possible retroactive effect of the new one-year limit on filing petitions in non-capital cases. But see Lyons v. Ohio Adult Parole, 105 F.3d 1063 (6th Cir. 1997) (for discussion of retroactivity with regard to other provisions of the AEDPA).

Other courts have reached differing conclusions on related issues. See Boria v Keane, 90 F.3d 36 (2d Cir. 1996), petition for cert. filed, 65 USLW

3342 (Oct. 11, 1996) (No. 96-628); Lindh v. Murphy, 96 F.3d 856, 86 1-77 (7th Cir. 1996) (en banc), cert. granted in part, 117 S.Ct. 726, 65 USLW 3483, 65 USLW 3487 (Jan. 10, 1997) (No. 96-6298); Thye v. United States, 96 F.3d 635, 636-37 (2d Cir.1996) (per curiam). See also United States ex rel. Austin v. Gilmore, 1996 WL 243047 (N.D. Ill. May 9, 1996) (unpublished) (declining to apply provisions of the amended statute absent guidance from the Court of Appeals or Supreme Court).

If applicable in this instance, new provisions of the AEDPA may require dismissal of this petition because such petition exceeds the new one-year period of *[p. 5]* limitations. Under the prior version of §2255, the statute provided that "A motion for such relief may be made at any time." This language has now been replaced with the following language:

> "A 1-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of--
> (1) the date on which the judgment of conviction becomes final;
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." AEDPA, amended §2255.

The above subsections (1) and (4) would apply to petitioner's present motion.

With regard to subsection (1), petitioner's federal conviction in Kentucky was "final" for purposes of the AEDPA time limitation in 1992 when the United States Supreme Court denied petitioner's petition for writ of certiorari. The respondent points out in a footnote that the petitioner's §2255 motion is clearly outside the time limit under subsection (1), but also notes that that the United States Department of Justice ("DOJ") has taken the position that if a conviction became final before April 24, 1996, the DOJ will not attempt to enforce subsection (1) of the AEDPA's time limit provisions until one year after the AEDPA was passed, i.e. April 24, 1997.

While petitioner's conviction in the United States District Court (M.D. Fla., Tampa Division) is not considered final because it is currently being

appealed to the 11th Circuit Court of Appeals, Case No. 95-2626, the date of finality for the Florida conviction would not provide a basis for the "latest date" under subsection (1) of the AEDPA with regard to the present §2255 motion, as this motion properly concerns only the petitioner's federal conviction and sentence in Kentucky.

With regard to subsection (4) of the habeas statute, the present motion is *[p. 6]* arguably based on "newly discovered evidence", specifically, testimony given by an FBI agent in the petitioner's trial in the United States District Court for the Middle District of Florida on January 10, 1995. Thus, such date would be the "latest date" for purposes of determining the one-year period of limitations under subsection (4). The present motion was filed on August 9, 1996, which is well over one year beyond the date of the new testimony which provides the basis for the present motion. Petitioner certainly "discovered" the facts supporting his claim on January 10, 1995.

The application of subsection (4) of the time limit provisions of the AEDPA has not been briefed by either party in this case. Rather than deciding the issue on an unbriefed record, this court will instead hold only that, if applied to this petition, the time limit amendments to the Act would bar this petition. As the newly amended statute does not specify an effective date for non-capital cases and in light of the

fact that no Sixth Circuit Court of Appeals case has yet decided the retroactivity issue with regard to the new one-year limitation provision of the AEDPA, this Court in this instance declines to apply the one-year statute of limitations against this petitioner. As this petition can be dismissed on other grounds, those other grounds will be set forth in the following analysis.

B. Procedural Analysis

Subsequent to Agent Sadowski's testimony in the Florida case, petitioner requested a hearing under Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) in the United States District Court for the Middle District of Florida. The Court denied the request. An appeal of petitioner's conviction in that court is presently pending before the Eleventh Circuit Court of Appeals, although the record before this Court does not indicate what issues were raised in that appeal. Petitioner subsequently filed a motion under §2255 in this Court, with jurisdiction based on petitioner's earlier conviction in the United States District Court for the Eastern District of Kentucky.

Thus, this Court is presented with a situation in which a federal court from another circuit, conducting a separate criminal trial involving related charges (i.e. linked by a predicate act) against the same

petitioner with the same counsel, has denied the petitioner's trial motion for a Franks hearing, and the conviction in that trial is presently being appealed. The procedural waters are further muddied because petitioner now attacks a different conviction in the present §2255 motion, making a second request for a Franks hearing on the same factual and legal basis *[p. 7]* as the previous request (i.e. the new testimony arising in the Florida case regarding the surveillance and affidavit). It is not the province of this Court to review the findings of the United States District Court in Florida, and this Court questions whether it may independently consider the Florida testimony as grounds for this §2255 motion when the same underlying argument has already been rejected by a federal court in another circuit.

While this Court, as the sentencing court in the present case, certainly has jurisdiction to consider a collateral attack on the federal Kentucky conviction, the respondent argues that a second consideration of this Franks issue is precluded by the Florida court's decision and cites Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) in support. Petitioner argues that "preclusion" is not appropriate because the appeal to the Eleventh Circuit Court of Appeals has not yet been decided, and thus, the decision is not truly "final". Assuming that the Florida court's denial

of the motion for the Franks hearing is one of the petitioner's grounds for appeal, the undesirable possibility of differing results in two different circuits regarding the same evidence, legal issue, and defendant could arise if this petition is reviewed on its merits.

In addition to the argument that the Florida Court's decision to deny a Franks hearing is not final, petitioner also raises the argument that the statements made by the Florida court have not "necessarily decided the matters that have to be determined in this [Ky.] case -- that is, whether the inaccurate statements were made purposefully or with reckless disregard for the truth, and whether the inaccurate statements were essential to the determination of probable cause." DE#485, Petitioner's Reply, p.9.

Contrary to petitioner's argument that these issues were not resolved, the record shows that the federal court in Florida denied the petitioner's motion for a Franks hearing for two reasons: 1) the allegedly false statement was not made with deliberate or reckless disregard for the truth, and 2) even without the challenged statement, the information was sufficient to support a finding of probable cause. The Honorable Susan Bucklew, United States District Court Judge, stated: "I not even prepared to say that it was made with reckless disregard for the truth. He [FBI Agent Sadowski] made an assumption.

However, if I move on and take the evidence as he testified to what he actually saw....I think this is sufficient probable cause in the affidavit for the Magistrate Judge in this case to sign....the search warrant and find there was probable cause to search." United States v. Johnson. et al., supra, T.R. pp.114-115.

Agent Sadowski candidly admitted at trial that the discrepancy at issue was *[p. 8]* based on an assumption on his part. Regardless of any holding in regard to the inaccuracy in the affidavit, the record shows that the trial court in Florida determined that the petitioner was also not entitled to a hearing because probable cause existed even without the challenged statement. See e.g. United States v. Barone, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979) (warrant will be voided only if the false statement is necessary to establish probable cause).

C. Franks Analysis

Even assuming, without holding, that this Court may at this time consider the second request for a Franks hearing and that this §2255 motion is not an impermissable substitute for an appeal, the petitioner is not entitled to relief under the issue presented in this §2255 motion.

In the direct appeal of his Kentucky federal conviction, the petitioner attacked the Magistrate's

finding of probable cause to issue the search warrant. A Magistrate's finding of probable cause is entitled to great deference. See United States v. Pelham, 801 F.2d 875, 877 (6th Cir. 1986), cert. denied, 479 U.S. 1092 (1987). In the present case, the Sixth Circuit Court of Appeals held that the Magistrate properly found probable cause to issue the search warrant for the purpose of searching the petitioner's home for evidence of a jewelry store robbery. United States v. Blakeney, 942 F.2d 1001 (6th Cir. 1991).

The Sixth Circuit upheld the finding of "probable cause" based on numerous facts set forth in the two affidavits, including: 1) that a burgundy Cadillac was linked to the robbery and that petitioner had a burgundy Cadillac registered under an "alias", 2) that items fitting the description of the stolen items were found in the petitioner's Cadillac, 3) evidence linked to the robbery and a catalog mailed to the petitioner's alias were found in the hotel room of defendant's associates, 4) Curtis Anderson had frequented the petitioner's residence, and 5) Curtis Anderson had been observed disposing of evidence of the jewelry store robbery in a trash dumpster. The Sixth Circuit Court of Appeals found that *both* affidavits were relied upon to find probable cause.

A reading of the August 19, 1989 affidavit shows that it was extensive and highly detailed. See DE#473,

Affidavits attached to "Insert". The subsequent affidavit, attached to the earlier affidavit, provided numerous additional details, including 1) information regarding the alias used by petitioner for his car registration and for utilities at his Florida residence, 2) items found in the prior search of the hotel room, ie. cocaine, drug paraphernalia, a mail item addressed to *[p. 9]* petitioner, and a Gucci watch in its original box, 3) items found in the trunk of petitioner's car upon petitioner's arrest, i.e. another Gucci watch in its original box, and so forth.

When an issue has been determined and rejected on direct appeal, such issue will not generally be reexamined in a motion under §2255. See Stephan v. United States, 496 F.2d 527 (6th Cir.), cert. denied, 423 U.S. 861 (1975)(issues in post-conviction §2255 motion that were raised previously raised on direct appeal were subject to dismissal as prior adjudicated claims). A §2255 motion may not be used to relitigate an issue that was raised and considered on direct appeal absent highly unusual circumstances. See United States v. Prichard, 875 F.2d 789-9 1 (10th Cir. 1989)(per curiam).

Petitioner, however, brings this §2255 motion based on new testimony and asserts that the Sixth Circuit Court of Appeals decision in the present case was based on an affidavit now shown to contain a material false statement. Petitioner again seeks to challenge the

validity of the search warrant for his residence, and alleges that, absent the false statement, probable cause for the search was not established. Presumably, petitioner seeks to invalidate the search warrant, suppress evidence, and obtain an order vacating the petitioner's conviction. Petitioner also assails the respondent's discussion of the legal standard for newly-discovered evidence and negates any question that petitioner might be asking for a new trial. See DE#485, Reply, p. 10. Petitioner states:

> "Newly discovered evidence, that surfaced in defendant's [sic] affidavit for search warrant, fruits of which were used in the Kentucky trial, was intentionally false, and that false information was essential to finding of probable cause. Therefore, evidence obtained in violation of 4th Amendment was used against defendant in the case under attack in this Motion. The tainted warrant spawned all subsequent evidence against defendant Blakeney used in Kentucky trial." (DE#473, Petition, p.5)

Assuming arguendo that the merits of the present motion under §2255 may be considered, petitioner has not demonstrated that he is entitled to a Franks hearing before this Court. The Supreme Court held in Franks v.

Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) that where a petitioner makes a substantial preliminary showing of falsity, "and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request." Id. at 155, 156. See also United States v. *[p. 10]* Bennet, 905 F.2d 931 (6th Cir. 1990).

While petitioner has pointed out a specific discrepancy in the sworn testimony and asserted that the challenged statement in the affidavit was made with deliberate or reckless disregard for the truth, the undersigned does not find any deliberate falsity in the affidavit. It appears from the record that the inaccuracy was not a deliberate lie, but rather a logical inference under the facts. Petitioner cites United States v. Cortina, 630 F.2d 1207 (7th Cir. 1980) and United States v. Baxter, 889 F.2d 731 (6th Cir. 1989) in support. However, those cases simply found that the respective affidavits lacked probable cause without their false assertions.

The essential question to consider next, is whether, if the challenged statement in the affidavit is disregarded, the remaining information supports a finding of probable cause to issue the search warrant. See United States v. Campbell, 878 F.2d 170 (6th Cir. 1989), cert. denied, 493 U.S. 894 (1989); United States v. Ursury, No. 94-

1127, slip opinion, (6th Cir. March 26, 1997). Probable cause is "defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." United States v. One 1984 Cadillac, 888 F.2d 1133, 1135 (6th Cir. 1989). Petitioner argues that without the challenged statement, the remaining information in the affidavit is insufficient to find probable cause. The undersigned disagrees and finds that even if the challenged statement is omitted from the August 19, 1989 affidavit, sufficient facts to find probable cause are amply demonstrated.

Petitioner points to the Sixth Circuit Court of Appeals statement that "in the absence of the August 19, 1989 affidavit, the search warrant was not supported with probable cause." See Blakeney, 942 F.2d at p. 1026. However, the lone inaccuracy in the August 19, 1989 affidavit does not invalidate the entire affidavit. See United States v. Campbell, 878 F.2d 170 (6th Cir. 1989), cert. denied, 493 U.S. 894 (1989); United States v. Barone, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Bennet, 905 F.2d 931 (6th Cir. 1990). As noted earlier, the August 19, 1989 affidavit was lengthy and highly detailed, and the subsequent affidavit provided additional material information. Thus, even if the challenged statement is omitted, the remaining information fully supports a finding of probable cause to issue the search warrant. Petitioner is not

entitled to a Franks hearing or to any other relief under §2255 in this Court. *[p. 11]*

CONCLUSION

Therefore, even assuming that the Franks issue may properly be considered at this time, this Court finds that the challenged statement by the FBI agent was an [*sic.*] logical assumption and did not rise to the level of "deliberate or reckless falsity". Furthermore, even after examining the affidavits in detail *without* the challenged statement, the undersigned finds that the remaining facts recited in the two affidavits provide sufficient facts to support a finding of probable cause to issue the search warrant for the petitioner's residence.

Thus, petitioner is not entitled to a Franks hearing or any other relief under §2255, as he has not shown any constitutional violation of his Fourth Amendment right to be secure "against unreasonable searches and seizures ....and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Constitution, Fourth Amendment.

RECOMMENDATION

It is **RECOMMENDED** that the "Motion to Vacate or Set Aside Sentence" (DE#473) by the defendant, Roy C.

Blakeney, be **denied**, and that this matter be dismissed with prejudice and stricken from the docket.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or further appeal is waived. United States v. Walters, 638 F.2d 947 (6th Cir. 1981); Thomas v. Am, 474 U.S. 140 (1985). Poorly drafted objections, general objections or objections that require a judge's interpretation should be afforded no effect and are insufficient to preserve the right of appeal. See Howard v. Secretary of Health and Human Services, 932 F.2d 505 (6th Cir. 1991). A party may file a response to another party's objection within ten (10) days after being served with a copy thereof. Rule 72(b), Fed. R.Civ.P.

This the 8th day of April, 1997.

[signed] _____
J.B. JOHNSON, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

Eastern District of Kentucky
F I L E D
DEC 8 1997
AT LONDON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

CIVIL ACTION NO. 96-316
CRIMINAL ACTION NO. 86-6-5-1

UNITED STATES OF AMERICA,
PLAINTIFF,

V.

ORDER

ROY C. BLAKENEY,
DEFENDANT.

* * * * * * * * * * * * *

This matter is before the court upon the Report and Recommendation of United States Magistrage Judge J.B. Johnson, Jr. (Record No. 486). The plaintiff has filed objections (Record No. 487) to the Report and Recommendation.

When the parties to the action submit objections to the magistrate judge's report, the court reviews the record *de novo*. 28 U.S.C. § 636(b)(1)(C).

After review of the record *de novo* in light of the plaintiff's objections, the court concurs with the result recommended by the magistrate judge in that this case should be dismissed. Therefore,

IT IS ORDERED that the defendant's petition pursuant to 28 U.S.C. §2255 is **DENIED.**

IT IS FURTHER ORDERED that the above-styled action is **DISMISSED WITH PREJUDICE and STRICKEN** from the active docket.

This the 8th day of December, 1997.

[signed] _____
Jennifer B. Coffman
United States District Judge

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 12-9-97
LESLIE G. WHITMER, CLERK

BY: [signed] Shirley Allen D.C.

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Amend. IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const., Amend. V, provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

U.S. Const., Amend. VI, provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."